Supreme Court, U.S.
FILED

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No. 031081 JAN 26 2004

In The
Supreme Court of the United States

DOMTAR MAINE CORP.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does the Federal Power Act ("FPA") require licensing of non-generating assets connected only to non-jurisdictional generation?

CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW

The parties to the appeal before the Court of Appeals were Petitioner Domtar Maine Corp. ("Domtar"), Respondent Federal Energy Regulatory Commission ("FERC"), and Intervenor Passamaquoddy Indian Tribe.

Domtar is an indirect wholly-owned subsidiary of Domtar Inc. George Weston Limited, a publicly-held company, owns more than 10% of the stock of Domtar Inc. There are no other publicly held companies that hold 10% or more of Domtar Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Domtar Maine Corp. ("Domtar") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit upholding a ruling by the Federal Energy Regulatory Commission ("FERC") that the Federal Power Act ("FPA") bestows jurisdiction upon FERC to require licensing of non-generating assets attached only to non-jurisdictional generation.

OPINIONS BELOW

Domtar petitioned the Court of Appeals of the District of Columbia Circuit to review a series of FERC rulings ultimately finding that three of its storage reservoirs must be licensed.[1] The Court of Appeals' opinion upholding FERC's decision is reported at *Domtar Maine Corp. v. Federal Energy Regulatory Commission*, 347 F.3d 304

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[1] The six FERC rulings related to Domtar's petitions were:

1. *Georgia-Pacific Corp.*, 77 FERC ¶62,189 (December 25, 1996) (Order Ruling on Petition for Declaratory Order and Finding Licensing Required) ("*Domtar I*")
2. *Georgia-Pacific Corp.*, 78 FERC ¶61,223 (March 4, 1997) (Order Denying Rehearing) ("*Domtar II*")
3. *Georgia-Pacific Corp.*, 81 FERC ¶62,222 (December 23, 1997) (Order Ruling on Petition for Declaratory Order and Finding Licensing Not Required) ("*Domtar III*")
4. *Georgia-Pacific Corp.*, 91 FERC ¶61,047 (April 13, 2000) (Order Granting Rehearing) ("*Domtar IV*")
5. *Georgia-Pacific Corp.*, 98 FERC ¶61,312 (March 18, 2002) (Order Denying Rehearing, on Clarification, Denying Motion for Hearing, and Granting Stay) ("*Domtar V*")
6. *Domtar Maine Corp.*, 99 FERC ¶61,276 (June 4, 2002) (Order on Rehearing, on Clarification and Lifting Stay) ("*Domtar VI*").

(D.C. Cir. 2003). The opinion is reprinted in the Appendix hereto ("App.") at 1-20.

JURISDICTION

The Court of Appeals exercised jurisdiction over Domtar's petitions for review pursuant to 16 U.S.C. §825*l*. The final opinion of D.C. Court of Appeals was issued on October 28, 2003. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The issue presented relates to a reading of the Federal Power Act, 16 U.S.C. §§791a *et seq.* ("FPA") as a whole. The most pertinent FPA sections are:

16 U.S.C.A. §796 Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

. . . .

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

. . . .

§797. General powers of Commission

The Commission is authorized and empowered –

. . . .

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided. . . .

In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation. . . .

§816. Preservation of rights vested prior to June 10, 1920

The provisions of this subchapter shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law. . . .

§817. Projects not affecting navigable waters; necessity for Federal license, permit or right-of-way; unauthorized activities

(1) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. . . .

The specific pre-1920 permit related to this case is found at 39 Stat. 534:

CHAP. 407. – An Act to authorize the maintenance and operation of dams across the Saint Croix River at Baileyville and Grand Falls, Maine.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of Congress is hereby given to the maintenance, use, and operation by the Saint Croix Water Power Company of the State of Maine and the Sprague Falls Manufacturing Company (Limited) of the Dominion of Canada of the two dams built by the said companies, jointly, across the Saint Croix River at Baileyville and Grand Falls, Maine; and the said dams are hereby declared to be lawful structures; *Provided,* That the construction, maintenance, and operation of the said dams, and the diversion thereby of the waters of said river, shall have received the approval of the International Joint Commission, so far as such approval may be required under the provisions of the Boundary Waters Treaty between the United States and Great Britain ratified May fifth, nineteen hundred and ten, and proclaimed by the President of the United States May thirteenth, nineteen

hundred and ten; *And Provided also,* That the plans and locations of said dams shall receive the approval of the Chief of Engineers and the Secretary of War.

Sec. 2. That the dams hereby authorized, and their maintenance and operation, shall be subject to and in accordance with all the pertinent provisions of the laws of the United States now in force, or which may hereafter be enacted by Congress to regulate and govern the construction of dams across navigable waters.

Sec. 3. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, August 25, 1916.

STATEMENT OF THE CASE

I. The Operative Facts are Undisputed: the Storage Reservoirs Do Not Generate Power, and, if Attached to Any Generation, that Generation is Excepted from FERC Licensing Requirements Pursuant to Section 23(b) of the FPA.

Domtar owns various hydroelectric facilities located in the St. Croix River basin near the border with Canada. *See Georgia-Pacific Corp.*, 91 FERC ¶61,047 at 61,173 (April 13, 2000) (containing a diagram of the facilities) (Administrative Record Item ("R.I.") 30). (*See* App. 21)[2]

Domtar also owns a dam and storage reservoir located at Forest City, and two dams and storage reservoirs on the West Branch of the St. Croix River. These facilities were built in the 1830s and in 1861 for the purpose of log

[2] At the inception of the FERC proceedings, Georgia-Pacific Corporation owned the reservoirs. FERC transferred the licenses to Domtar in 2001. *See Georgia-Pacific Corp.*, 97 FERC ¶62,078 (2001). For ease of reference, the petitioner and reservoir owner will be referred to herein as Domtar.

driving and water storage. They have no generating facilities on-site. *Domtar V*, 98 FERC ¶61,312 at 62,333 (R.I. 45). The only generating facilities to which these storage facilities could be deemed hydraulically connected are the Grand Falls and Woodland projects. These are located 10 and 35 miles downstream from the reservoirs. *See id.*

Neither the Grand Falls nor the Woodland projects require licensing under the FPA, because they were authorized by a 1916 Act of Congress (39 Stat. 534). *Id.*[3]

II. FERC Ultimately Rejects All of Domtar's Arguments As to Why the Reservoirs Are Not Subject To Its Jurisdiction.

A. In the First Set of Petitions, FERC Rules that the Reservoirs Must Be Licensed Even Though They Could Only Serve Excepted Generation.

Domtar filed its first set of petitions before FERC asking it to rule that the Forest City and West Branch facilities did not require licensing in 1995.[4] Domtar argued that no licensing was required because:

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[3] Section 23(b) of the FPA, 16 U.S.C. §817, provides that it shall be unlawful for anyone:

> for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, power house or other works incidental thereto . . . except under and in accordance with the terms of a permit . . . granted prior to June 10, 1920, or a license granted pursuant to this chapter.

Hence, a facility owner does not need a license under the FPA if it has a pre-1920 permit. Domtar and FERC agree that the 1916 permit excepts the Grand Falls and Woodlands Projects from FERC jurisdiction; FERC so expressly held in 1988. *Georgia-Pacific Corp.*, 45 FERC ¶¶62,070, 62,071 (1988).

[4] Domtar's predecessors had applied for and accepted licenses for the Forest City and West Branch projects (1) because FERC requested

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- FERC had ruled in 1988 that the only downstream "projects" to which the reservoirs could be deemed attached were excepted from its jurisdiction (*see supra* n.2);
- Sections 3 and 4 of the FPA (16 U.S.C. §§796(11)(12) and 797(e)), require licensing only of "project works"; and
- Because the reservoirs could only be deemed works within excepted "projects," the reservoirs, as a part of those projects, fell within the exception.[5]

In asserting this argument, Domtar observed that FERC's then-recent decision in *Union Water Power Company*, 68 FERC ¶61,180 (1994), *reh'g denied*, 73 FERC ¶61,296 (1995), confirmed that storage facilities had to be a part of a licensed project to require licensing.[6] (R.I. 50 at 2-3, 12-13).

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in the early 1960s that those dams be licensed (*see* R.I. 50 at 5, 8), and (2) to provide protection from potential takeover of those dams by non-utility hydropower developers (*see* R.I. 50 at 6, 8). Domtar's predecessors specifically reserved the right later to contest the Commission's licensing jurisdiction. (R.I. 50, exh. D).

[5] 16 U.S.C. §796(12) defines "project works" as "the physical structures of a project." 16 U.S.C. §796(11) defines a "project" as a "complete unit of improvement or development, consisting of a power house . . . and all storage . . . reservoirs directly connected therewith . . . and all . . . reservoirs . . . which are necessary or appropriate in the maintenance and operation of such unit." Domtar argued that "[t]o the extent the Storage Facilities are a part of any unit of development," they are a part of the excepted Grand Fall project. Because that project was admittedly excepted, as FERC ruled in 1988, it followed that so were the facilities as part of that unit of development. (R.I. 50 at 1).

[6] In *Union Water*, FERC said:

> In order to determine whether we have jurisdiction over the facilities under consideration, we must determine whether they are "used and useful in connection with" the "complete unit" of improvement or development" of a *licensed* project or any part thereof, or "necessary and appropriate in

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In response, FERC acknowledged that the reservoirs were a part of the Grand Falls and Woodland Projects. *Domtar I*, 77 FERC ¶62,189 at 64,351 (the storage reservoirs "substantially benefit the generation of electricity at [Domtar's] downstream Grand Falls and Woodland Hydro Projects. The West Branch and Forest City Projects are pursuant to the terms of section 3(11) [16 U.S.C. §796(11)] of the [FPA], part of the same unit of development as the Grand Falls and Woodland Projects.")

Even though the reservoirs were admittedly part of excepted projects, however, FERC ruled that they still required licensing. In support of this legal conclusion, FERC cited in *Lake Ontario Land Development v. Federal Power Commission*, 212 F.2d 227 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954), in which the Court of Appeals held that FERC could require licensing of parts of a project even if other parts of a project were outside of its jurisdiction (because they were located in Canada). *Domtar I*, 77 FERC ¶62,189 at 64,352.

In its petition for rehearing, Domtar noted that the *Lake Ontario* decision was not relevant, because there the generation – the power house – was jurisdictional, *i.e.*, located within the United States. The FPA focuses on generation; in Domtar's instance, because the generation lies outside FERC's jurisdiction, FERC had no basis in the FPA to assert jurisdiction over the non-generational portions of the project. (R.I. 59 at 5: "the Commission's

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> the maintenance and operation" of *such* a unit, as those terms are defined in Section 3(11) of the FPA [16 U.S.C. §796(11)]

68 FERC ¶61,180 at 61,889-90 (emphasis supplied). *See also id.* at 61,888-89 ("In determining whether facilities are part of a complete unit of improvement or development, the Commission examines the relationship between the facilities in question and the *already-identified jurisdictional* components of the hydropower project") (emphasis supplied).

jurisdiction can be no broader than that specifically set forth in the FPA.")[7]

In denying rehearing, again citing *Lake Ontario*, FERC confirmed its position that it was immaterial that the generation to which the reservoirs were deemed connected did not fall within its jurisdiction. *Domtar II*, 78 FERC ¶61,223 at 61,954.[8]

B. In the Second Set of Petitions, FERC Finds that the Reservoirs Are Connected, *i.e.*, "Necessary or Appropriate," to the Operation of the (Excepted) Generation.

In 1997, Domtar tried again. Having lost the legal argument that the FPA does not bestow jurisdiction on FERC to require licensing of non-generational assets connected only to non-jurisdictional generation, Domtar argued that the reservoirs were not in fact connected even to the excepted generation, *i.e.*, the reservoirs were not "necessary or appropriate" to the excepted projects to be deemed "project works" under Section 3(11) of the FPA. *See supra* n.5.

In making this argument, Domtar noted, *inter alia*, that the purpose of the reservoirs when built had not been to generate power, and that the purpose of the reservoirs now was not to generate power.[9]

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[7] Domtar also expressly reserved the right to argue that the facilities were not hydraulically connected to even the excepted generation. (R.I. 59 at 3 n.3).

[8] FERC also rejected Domtar's express reservation (*supra* n.7) as coming too late in the proceedings. *Domtar II*, 78 FERC ¶61,223 at 61,954, n.11.

[9] As Domtar explained in its petition, by virtue of an international treaty and environmental and recreational demands upon the reservoirs, the reservoirs were operated in order to meet environmental and

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In response,[10] noting, *inter alia*, that the reservoirs "are operated not for downstream power benefits, but to minimize downstream flooding and provide low-flow augmentation," FERC held that no license was required. *Id.* at 64,483.

On rehearing however, with one Commissioner dissenting, FERC changed its mind. *Domtar IV*, 91 FERC ¶61,047. The purpose of the reservoirs' operation, FERC ruled, was irrelevant – FERC looked only at impact. *Domtar V*, 98 FERC ¶62,334 at 62,336 ("[t]o do otherwise would require us to . . . focus on the subjective intentions of the reservoir owner"). In response to Domtar's argument that FERC's test deviated from its past decisions and provided no guidance (*see* R.I. 31 at 1, 19, 28-34), FERC stated that it had to be flexible, and looked at a totality of the circumstances. Because the operation of the reservoirs collectively increased the total annual generation for the Grand Falls Project 2.4-4.9%, such incidental benefit was in itself sufficient for the reservoirs to be deemed "necessary or appropriate" within the meaning of Section 3(11). *Domtar V*, 98 FERC ¶62,334 at 62,336.

In its request for rehearing, Domtar also noted the collective inconsistency in FERC's rulings in the two sets of petitions: how could FERC rule that a reservoir is "necessary or appropriate" and therefore a part of a "project," while at the same time acknowledging that the only "project" to which the reservoirs are "necessary or appropriate" is excepted from its jurisdiction? (R.I. 31 at 34: the reservoirs "are part of the same 'unit of development' – *i.e.* the Grand Falls Project – or they are not. The

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recreational goals. *See* The Boundary Waters Treaty of 1909, January 11, 1909, U.S.-U.K., 36 Stat. 2448 (*See also* R.I. 1).

[10] FERC expressly agreed to re-visit the licensing issue, rendering academic its previous ruling in the first set of petitions that Domtar could not reserve the argument. *Domtar III*, 81 FERC ¶62,222 at 64,483 n.5. *See supra* notes 7 and 8.

Commission's decisions in the two jurisdictional proceedings are fundamentally at odds with each other").

In response, FERC said it saw no inconsistency, apparently because it treated the reservoirs in themselves as jurisdictional "projects" – even though the reservoirs did not generate power themselves and thus did not fall within the FPA's definition of a project. *See supra* note 5. *See Domtar V*, 98 FERC ¶62,334 at 62,335 n.22 ("The projects [*i.e.*, the reservoirs] at issue here were not included in the pre-1920 permit. Thus, they are not exempted from licensing. Since we find them to be necessary or appropriate to downstream generation, they must be licensed, regardless of whether the generating facilities must themselves be licensed").

C. The Court of Appeals Affirms.

Domtar's judicial challenges to FERC's rulings on both sets of petitions were consolidated before the Court of Appeals.

Domtar reasserted the fundamental argument made in both sets of petitions that either the reservoirs were a part of the excepted projects or they were not. Either way, FERC had no jurisdiction.

If the reservoirs were *not* a part of the downstream Grand Falls or Woodland projects – if they were not "necessary or appropriate" – then FERC had no jurisdiction, because the reservoirs would not be "for the purpose of developing power," as required by the FPA. *See* 16 U.S.C. §817 (it shall be unlawful for anyone "for the purpose of developing electric power . . . to maintain any . . . reservoir . . ."); *Chemehuevi Tribe v. Federal Power Commission*, 420 U.S. 395, 414 n.17 (1975) ("it is most natural to read §23(b) reference to using water 'for the purpose of developing electric power' to mean harnessing the power of falling water to produce electric energy").

This point was not belabored at the administrative level, because the fundamental need for an asset to be

connected with generation in order to fall within FERC's jurisdiction was indisputable and in any event admitted. (*See* R.I. 59, Domtar's request for rehearing in the first set of petitions, noting that FERC and Domtar "appear to agree: (1) the Storage Facilities would not be subject to the Commission's jurisdiction if not operationally connected to a generating hydro facility"); *Domtar IV*, 91 FERC ¶61,047 at 61,172 (FERC's rejection of the request for rehearing: "Were we to find that the storage reservoirs are not necessary or appropriate with regard to the downstream projects, this would equate to a finding that the reservoirs are not being maintained for the purpose of generating electricity, so that Section 23(b) would not apply").

Conversely, if the reservoirs *were* "necessary or appropriate," then they formed a part of the Grand Falls and/or Woodland "complete units of development," *i.e.*, Projects. Again, FERC admitted this fact. First, FERC conclusively found the downstream projects excepted in 1988. *Georgia-Pacific Corp.*, 45 FERC ¶¶62,070, 62,071 (1988). Second, FERC confirmed in ruling on Domtar's first set of petitions that FERC was treating the reservoirs as a part of the excepted downstream projects. *Domtar I*, 77 FERC ¶62,189 at 64,351 (the reservoirs "are pursuant to the terms of section 3(11) [16 U.S.C. §796(11)] of the [FPA], part of the same unit of development as the Grand Falls and Woodland Projects.")

Yet FERC failed to recognize the ramifications of these conceded points: If the only "project" to which these reservoirs were connected was outside FERC's jurisdiction, how could FERC assert jurisdiction over the reservoirs as "project works"? How can FERC have jurisdiction over reservoirs connected only to excepted generation when FERC's jurisdiction over non-generational assets is entirely

dependent upon the assets' association with generation in the first place?[11]

Domtar also repeated the arguments that FERC had failed to adhere to *Union Water* or even acknowledge deviation, and that FERC's decisions as to whether a reservoir was "necessary and appropriate" had applied no coherent test, so that FERC was acting arbitrarily.

In upholding FERC's holding that the storage reservoirs had to be licensed, the Court reasoned:

- Because the 1916 permit did not expressly mention the upstream reservoirs, Congress's intent to not include them within the permit was purportedly "clear" (347 F.3d at 309, App. 9);
- Domtar would not be allowed to cite Subsection 23(a) of the FPA in support of its position, because Domtar had not cited that subsection before FERC (*id.*);[12]

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[11] A "project" is defined under Section 3(12) as a "complete unit of improvement or development, consisting of a *power house, . . . and . . .* reservoirs . . . necessary or appropriate in the maintenance and operation of such unit." If there is no power house, as noted above, there is no FPA jurisdiction. The FPA's entire jurisdictional predicate is generation.

[12] Section 23(a) provides:

> **Preservation of rights vested prior to June 10, 1920**
>
> The provisions of this subchapter shall not be construed as affecting any permit . . . granted prior to June 10, 1920 . . . , or as affecting any authority heretofore given pursuant to law. . . .

16 U.S.C. §816. Domtar noted in its reply brief that if the upstream reservoirs form a complete unit of development with the concededly excepted generation, requiring a separate license for reservoirs existing at the time the permit was issued would "affect" the permit and the "authority" previously given under that permit. The "terms" of a "permit" within the meaning of Section 23(b) had to be read consistently with Section 23(a). Because Section 23(a) freezes the snapshot of

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- The *Lake Ontario* decision cited by FERC is not on point (*id.* at 310, App. 12);
- While FERC did appear to say in *Union Water* that storage reservoirs must be associated with a licensed project, and the language in that decision cannot be dismissed as mere description (as FERC argued), Domtar nevertheless should not prevail because Domtar could not cite any other FERC decision in which FERC held that it lacked jurisdiction over non-generating plant connected only to exempt generation; "[a]bsent any such inconsistency between previous Commission rulings and FERC's orders in this case, we will not overturn FERC's interpretation of its own ruling" (*id.* at 311, App. 13);
- FERC's test for what is "necessary and appropriate" is not arbitrary and capricious, because FERC effectively applies a two-level "impact" test, requiring aggregate average benefit of the facilities to be something above two percent, and the average impact of a particular facility to be much lower, something around .1 percent. While FERC had never actually phrased its test as such, this interpretation "explain[ed]" FERC's previous decision in *Chippewa and Flambeau Improvement Co.*, 94 FERC ¶61,017 (1998), *reh'g denied*, 95 FERC ¶61,327 (1998), *aff'd*, 325 F.3d 353 (D.C. Cir. 2003). "To be sure," the Court said, "FERC does not explicitly advance this framework . . . but we think that it 'may reasonably be discerned' from FERC's previous decisions." (347 F.3d at 312, App. 15);

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rights as of the issuance of the permit, it follows that there is no need to explicitly include all assets in the permit itself to fall within its terms.

- Domtar would not be allowed to cite *Union Water* in support of its argument that FERC erred in not assessing the impact of the facilities individually because, while Domtar made the argument that FERC's rulings are inconsistent because FERC sometimes considers facilities in isolation and at other times aggregates their effects, Domtar did not specifically cite *Union Water* before FERC for that proposition (*id.*);
- Domtar would not be allowed to argue that the purpose of the reservoirs is not power generation as required under Section 23(b) because Domtar did not make that argument in its first set of petitions before FERC. While Domtar did argue that Section 23(b) provides for jurisdiction only if the reservoir is operated for the purpose of generation, Domtar purportedly waived the argument because it did not "expand[] upon that assertion." Given that Domtar had not more explicitly argued against FERC's position that the reservoirs' purpose was not power generation, Domtar purportedly "left FERC with no reason to think that Domtar was advancing an argument about section 23(b)(1)." While Domtar "did make a detailed purpose argument" throughout the second set of petitions citing Section 3(11), and FERC itself stated that a "section 3(11) purpose argument" is "closely related" to "a section 23(b)(1) purpose argument," leaving the Court "skeptical" that FERC had no notice of the Section 23(b) argument, the Court would not entertain the argument. (*id.* at 313, App. 18).

REASONS FOR GRANTING THE WRIT

The Court should grant the writ for two reasons.

First, the question whether FERC can assert jurisdiction over non-generating assets if that facility is connected only with non-jurisdictional generation is an important question of federal law that has not been, but should be, settled by this Court. *See* S.Ct. Rule 10(c). The question is important because it goes to the core meaning of the Federal *Power* Act. Contrary to FERC's position, upheld by the Court of Appeals, absent the jurisdictional predicate for FERC authority under the FPA – generation – FERC cannot act. To the extent any precedent relates to this issue, that precedent – *Chemehuevi*, *supra,* clashes with FERC's position. *See* S.Ct. Rule 10(c) (character of reasons the Court considers in determining whether certiorari should be granted includes "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court").

Second, the means by which the Court of Appeals arrived at its conclusion violated fundamental principles of administrative law as set out by this Court in *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 and 332 U.S. 194, 196 (1947) and *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983). As such, the Court of Appeals not only "decided an important federal question in a way that conflicts with relevant decisions of this Court," S.Ct. Rule 10(c), but "so far departed from accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S.Ct. Rule 10(a). Not only does the Court of Appeals' waiver ruling show a fundamental misunderstanding of the primary issue before it, but the Courts' approach, in allowing Domtar not to add any additional citations to support its claim at the judicial level while at the same time inventing, post hoc, an administrative test to justify the agency's rulings, violates core principles of review of administrative decisions.

I. THE ISSUE WHETHER THE FPA REQUIRES LICENSING OF NON-GENERATIONAL ASSETS CONNECTED ONLY TO NON-JURISDICTIONAL GENERATION IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court of Appeals correctly noted that there is no case law on the primary issue presented to it: whether FERC can assert jurisdiction over non-generational assets only connected to generation excepted from its jurisdiction. The Court of Appeals also correctly noted that the *Lake Ontario* decision is not relevant. Finally, the Court correctly noted that the only relevant FERC decision is *Union Water*, and that in that decision, FERC set up a two-part test for jurisdiction over storage reservoirs, with the first part of the test requiring connection with a "licensed" project. (347 F.2d at 311, App. 13) Beyond that, the Court of Appeals went astray.

The Court of Appeals concluded first that Congress clearly had no intent to include the upstream reservoirs in the 1916 permit because the reservoirs were not listed in the permit's express terms. While this conclusion has dubious support,[13] this reading of the 1916 permit itself is

[13] Consistent with the concept that the key to FPA jurisdiction is generation, the 1916 permit expressly references Grand Falls and Woodland (Baileyville) – the location of the generating facilities. *See* Ch. 407, 39 Stat. 534 (1916). It is by no means "clear" that by expressly citing the generation locations, Congress meant to exclude any non-generational assets connected to that generation. There certainly would be no logical reason why Congress would want to exclude these pre-existing assets from its authorization. As of 1916, the only governing federal statute for construction on navigable waters was the Rivers and Harbors Act of 1899, 33 U.S.C. §401. The reservoirs were already in existence and Congress would have perceived no need for specific authorization – because there was no such need at that time.

fact-specific to the instant case and therefore unlikely to be of certiorari-worthy import.

Beyond that case-specific question, however, lies the broader issue, which does have general and wide importance: assuming no such express intent in a pre-1920 permit, does anything in the FPA allow FERC to assert jurisdiction over non-generational assets connected only to non-jurisdictional generation?

In addressing this broader question, the Court of Appeals made a threshold mistake by concluding that FERC could deviate from its previous position in *Union Water* that FERC does not assert jurisdiction absent relationship with a "licensed" project. *Union Water*, 68 FERC ¶61,180 at 61,889-90; *see supra* n.5. The Court of Appeals reasoned that agency deviation was permitted because FERC's position as to its jurisdiction was not critical to the actual holding in *Union Water* (because the generation involved in *Union Water* was not excepted). (347 F.3d at 312, App. 15)

Whether the pronouncement of its position in *Union Water* was essential to the holding in that case or not, however, FERC made it clear in that decision that it was announcing its general and considered position as to jurisdiction over a non-generational plant. *See Union Water,* 73 FERC ¶61,296 at 61,823 (contrasting its decision in *Union Water* with predecessor decisions, noting that "the Commission has previously generally expressed its determinations on this issue in relatively summary fashion").

An agency can deviate from its previous position, but it is black letter law that in doing so, it must acknowledge and explain that deviation. *Motor Vehicle*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned

analysis . . .") (ellipses in *Motor Vehicle*, citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).[14]

It is beyond peradventure that FERC did not do this here; rather, FERC took the position before the Court of Appeals – which the Court of Appeals rejected (347 F.3d at 311, App. 13) – that the agency had never taken that position in *Union Water* in the first place. For the Court of Appeals to allow FERC to deviate from its previous test without acknowledgment and explanation flies in the face of *Motor Vehicles* and its progeny on a core principle of administrative law.[15]

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[14] The phrase cited by this Court in *Motor Vehicles* from *Greater Boston* continues: " . . . indicating that prior policies and standards are being deliberately changed, not casually ignored."

[15] The only other relevant FERC decisions were FERC's final and unappealed decisions in 1988 that the Grand Falls and Woodland "Projects" were excepted from FERC jurisdiction. 45 FERC ¶¶62,070, 62,071. FERC having ruled in 1988 that the "Projects" were excepted, in 1995 Domtar argued that, assuming these reservoirs were a part of those projects, it followed inexorably that the reservoirs fell within the exception. Nowhere did either FERC or the Court of Appeals respond to this simple 1+1=2 point. Again, at a minimum, under *Motor Vehicle*, FERC is obligated to explain why it chose to deviate from those previous rulings. Instead, however, FERC confirmed in 1995 that it was holding that the reservoirs did form a part of the Grand Falls "complete unit of development" – *i.e.*, was a part of the excepted project – without explaining how, if this were true, the reservoirs were not therefore excepted.

The Court of Appeals then also failed to address this point. Instead, it made confusing waiver findings that, as discussed *infra*, seem to indicate that the Court did not understand the question before it. In any event, none of these waiver findings go to this 1+1=2 argument set forth above, which Domtar clearly made before FERC (*e.g.*, Domtar's first petition, R.I. 50: "To the extent the Storage Facilities are part of any unit of development, they are part of the Grand Falls Hydro Project, a project that the Director, Office of Hydropower Licensing, by order has concluded is not required to be licensed under Section 23(b) of the FPA").

Beyond this fatal and troubling flaw, however, is the fact that both FERC and the Court of Appeals ignored not only the plain language of the FPA itself, but turned the burden of proof on its head – in a second violation of a fundamental principle of administrative law.

The Court of Appeals appears to have held that FERC can assert jurisdiction over non-generational assets connected to only non-jurisdictional generators because FERC had never held that it could not assert such jurisdiction. Having concluded that *Lake Ontario* was not relevant, and *Union Water* not binding, the Court of Appeals then affirmed FERC's assertion of jurisdiction based on the Court's perception of a lack of any binding judicial precedent that FERC could not assert jurisdiction.

But FERC is a creature of statute, the FPA. Contrary to FERC's position in this case,[16] FERC does not have jurisdiction over assets unless Congress gives FERC affirmative authority to regulate. Nothing in the text of the FPA supports the conclusion that FERC can assert jurisdiction over nongenerating storage reservoirs hydraulically connected to excepted generation. It follows that FERC has no such jurisdiction.[17]

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[16] FERC ruled that it could assert jurisdiction here because "Section 23(b)(1) of the FPA does not state that dams and reservoirs operated to develop electric power must be connected to jurisdictional generating facilities to warrant licensing," *Domtar II*, 78 FERC ¶61,223 at 61,953. Hence, according to FERC -- and sustained by the Court of Appeals – FERC can assert jurisdiction because nothing in the FPA expressly states that it cannot.

[17] In his dissent, Commissioner Hébert recognized this point. FERC's jurisdiction, he said, "is not boundless. I do not believe that Congress intended the Commission, as a general matter, to consider the jurisdictional status of dams and reservoirs that lack some nexus to a *licensed* project." *Domtar IV*, 91 FERC ¶61,047 at 61,174 (Hébert, dissenting) (emphasis in original).

Nowhere does the Court of Appeals cite any provision in the FPA as the basis for FERC's jurisdiction. Thus, once again, the Court of Appeals ignored perhaps the most basic principle of administrative law: an agency must have a statutory basis for exercising authority. *See Washington Water Power Co. v. FERC*, 775 F.2d 305, 334 (D.C. 1985) (Commission's jurisdiction is "subject to and limited by section 23 of the" FPA); *id.* at 335 ("the Commission's jurisdiction does not extend to developments with valid pre-FPA authority").

The statutory language here, moreover, shows that FERC does *not* have the power to assert jurisdiction over a non-generational facility connected only to non-jurisdictional generation. The fact that this language relates to the essence of the FPA shows why the issue is an important one, worthy of this Court's review.

This is the Federal *Power* Act. The most fundamental principle behind the FPA is that FERC can only assert jurisdiction when the assets at issue are tied to power generation. Pervasive language throughout the FPA reflects this basic premise. *See Chemehuevi*, 420 U.S. at 409, 413 (1975) ("[t]he original title, preamble, and text of Part I of the Federal Power Act provide strong evidence that Congress intended to restrict the Commission's licensing jurisdiction with respect to the power industry to the construction and maintenance of hydroelectric facilities"; "from 1921 to the present the Commission has consistently interpreted its licensing authority as being 'limited to the consideration of projects designed to produce water power").[18]

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[18] In *Chemehuevi*, this Court held that the Federal Power Commission ("FPC"), FERC's predecessor, had no power to license thermal-electric power plants using large amounts of water for cooling purposes from navigable waters of the United States, because nothing in the FPA gave the FPC that power. As the Court stated:

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For example, to be a project, Section 3's definitions require a reservoir to be connected to a power house – generation. *See supra* note 11. Sections 4(e) and 23(b) also focus on the purpose of the plant as power generation. *See supra* notes 3 and 5; *see also* 16 U.S.C. §797.[19] Absent

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> Whatever the merits of the complainants' argument as a matter of policy, it is properly addressed to Congress, not to the courts. The legislative history of the Federal Water Power Act conclusively demonstrates that in 1920 Congress intended to provide for the orderly development of the power potential of the Nation's waterways only through the licensing of hydroelectric projects.

See Chemehuevi, 420 U.S. at 423-24. *See also id.* at 424 ("until Congress changes the licensing provisions of Part I of the Federal Power Act, it is our duty to apply the statute as it was written").

[19] The Court of Appeal's apparent ruling that Domtar could make a "Section 3(11) purpose argument" but waived a "Section 23(b) purpose argument" demonstrates the Court's fundamental misunderstanding of this point and, indeed, the primary argument before it.

There is no "Section 3(11) purpose argument" separate from a "Section 23(b) purpose argument." From the outset, the question before FERC was whether the storage reservoirs required licensing under Section 23(b), and Domtar consistently so framed the issue. (*E.g.*, Domtar's first petition: "The issue raised in the petition . . . is whether [the reservoirs] . . . are required to be licensed under Section 23(b) of the Federal Power Act.") (R.I. 50). In the proceedings on the first set of petitions, Domtar expressly cited Section 23(b)'s requirement that the reservoirs be operated for the purpose of developing electric power (*see* 347 F.3d at 313, App. 17), and FERC itself acknowledged this common premise pursuant to which Domtar and FERC were working: Section 23(b), like Section 3(11) and 3(12) (and Section 4 and the FPA in general) requires a nexus with generation for FERC to assert jurisdiction. *See Domtar IV*, 91 FERC ¶61,047 at 61,172 ("Were we to find that the storage reservoirs are not necessary or appropriate with regard to the downstream projects, this would equate to a finding that the reservoirs are not being maintained for the purpose of generating electricity, so that Section 23(b) would not apply.") Throughout these proceedings, Domtar has consistently argued – and argues today – that FERC is failing to recognize the necessary ramification of this conceded need for such a nexus: if the only generation to which a dam is connected is

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non-jurisdictional, then FERC has no jurisdiction over that facility, because FERC's jurisdiction under the FPA is dependent upon generation.

In the first set of petitions, Domtar assumed that purpose of the reservoirs was to benefit downstream generation (*i.e.*, that the reservoirs were "necessary or appropriate" to the downstream projects). That was Domtar's point: if the reservoirs are operated for the purpose of power generation, then they are a part of the downstream project, which is excepted, excepting them as well. Conversely, if that is not their purpose, then there is still no FERC jurisdiction, because FERC cannot assert jurisdiction over a facility unconnected with generation. Either way, the reservoirs are not subject to FERC jurisdiction. Domtar repeatedly made this argument throughout both sets of petitions. (*E.g.*, R.I. 59 at 163 (first set); R.I. 25 at 34 (second set)).

The Court of Appeals' conclusion that there were somehow two separate arguments under Section 3(11) and 23(b) thus underscores that the Court did not understand the argument, which goes to the heart of the FPA: jurisdiction under the FPA is trigged by generation.

Perhaps confusing the Court of Appeals was another issue relating to "purpose" which also was not waived and which again shows the Court of Appeals' fundamental misunderstanding of the issue before it and misapplication of core principles of administrative law.

In *Chippewa*, *supra*, a case preceding Domtar's, another reservoir owner, like Domtar, argued that FERC's test to decide whether a facility is "necessary or appropriate" is standardless. *See Chippewa*, 325 F.3d at 358. The Court of Appeals in *Chippewa* rejected the other owner's assertion of this argument, because the Court found that FERC's test was coherent. That test, as described by the Court and articulated by FERC in *Chippewa*, involves examination of a variety of factors – including the purpose of the assets at issue. *Chippewa,* 325 F.3d at 358 ("The Commission notes that its orders in this and other cases set out a series of relevant factors, including the effect of the reservoir upon downstream generation and its storage capacity, location, and *purpose*") (emphasis supplied).

In the instant case, Domtar pointed out to the same Court of Appeals that, when Domtar argued that the reservoirs had no generational purpose, FERC had expressly ruled that purpose was *not* relevant and not a part of its test. *Domtar V*, 98 FERC ¶62,334 at 62,336. Thus, FERC had deviated from the test that the Court had previously identified as FERC's, and which the Court had upheld as not arbitrary because FERC consistently applied that test.

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generation, there is no FERC authority to act. *See also National Wildlife Federation v. FERC*, 912 F.2d 1471, 1473 (D.C. Cir. 1990) ("Because a small hydroelectric power house was to be built along the dam, FERC jurisdiction attached to the project"); *Cooley v. FERC*, 843 F.2d 1464, 1466 (D.C. Cir. 1988) (noting the "substantial possibility" that FERC did not have jurisdiction over a project under Section 23(b) because it was unclear when "the generators" were built and because "[u]nder §23(b), licenses are required for projects . . .").

FERC and the Court of Appeals are rejecting this fundamental premise of the FPA, *i.e.*, that non-generating assets cannot by themselves be jurisdictional. FERC's ruling, upheld by the Court of Appeals, declares that there need not be any jurisdictional generation for FERC nevertheless to assert its authority over non-generational plant. This ruling violates the most basic premise of the FPA. While FERC and the parties before it may refer informally to any construction on navigable waters as a "project," *see Domtar V*, 98 FERC ¶62,334 at 62,335 n.22 ("The projects [*i.e.*, the reservoirs] at issue here were not included in the pre-1920 permit"), the FPA itself defines the word, with the requirement that generation be included. 16 U.S.C. §796(11) (defining "project" as a "complete unit of improvement or development, consisting of a *power house* . . .

The Court of Appeals did not respond to Domtar's observation of this point in its written decision. Instead, ignoring what it had previously ruled in *Chippewa,* the Court of Appeals conjured up yet *another*, different, two-part "impact" test, and ruled *that* test was coherent. Thus, not only has FERC's standardless test bounced from case to case, but the Court of Appeals' identification of what that test is deviates from case to case as well – and yet this test is somehow not arbitrary or capricious. Again, the Court of Appeals' *sub silentio* approval of (and indeed, participation in) this deviation and re-conjuring demonstrates yet another way in which the Court of Appeals ignored the *Motor Vehicle* principle: while an agency's test can change, that change must be acknowledged and explained.

and all reservoirs . . . necessary or appropriate in the maintenance and operation of such unit" (emphasis supplied)). Domtar's storage reservoirs are not a "project" or "projects" in themselves under the plain language of Section 3(11) and (12). Without the prerequisite of association with jurisdictional generation, the FPA does not apply. The tail cannot wag the dog.

Under the Court of Appeals' ruling – and it is the Court of Appeals for the District of Columbia Circuit that decides the bulk of FPA licensing disputes – the FPA bestows power upon FERC to require licensing of assets even when (a) those assets do not generate power; (b) when built, the purpose of those assets was not to assist in the generation of power; (c) the purpose of the assets remains not to generate power; and (d) any generation even remotely impacted by the assets falls outside FERC's jurisdiction. This ruling conflicts with the *Chemehuevi* and the essence of the FPA and should be reversed.

II. THE REASONING APPLIED BY THE COURT OF APPEALS IN UPHOLDING FERC's DECISION VIOLATES FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW.

The Court of Appeals made a series of rulings regarding waiver that are simply wrong.[20] Mere error, however, is not normally a basis for granting certiorari. The problem

[20] For example, the Court of Appeals held that Domtar could not cite *Union Water* in support of its observation that FERC in the past looked at reservoirs separately, not in the aggregate, because Domtar had not cited that case before FERC for this proposition. (347 F.2d at 312 App. 16) This ruling, aside from being wrong as a matter of law (additional support may be asserted before a court, *see infra*) is incorrect as a matter of fact. Domtar did expressly cite *Union Water*. (R.I. 25 at 19 n.2, citing *Union Water*, 73 FERC ¶61,296 at 61,825). *See also supra* n.20, describing other errors of the Court of Appeals in its waiver rulings.

here is that, viewed collectively, the common theme of the Court of Appeals' mistakes reflects the application of a standard of review at odds with this Court's previous decisions and bedrock principles of administrative law.

Aside from *Motor Vehicle* problems noted above – the Court of Appeals' license to FERC to deviate from its test in *Union Water* without agency acknowledgement or explanation – the Court of Appeals also ignored this Court's fundamental rule that a court does not act as a super-agency; rather, an agency's decision can only be upheld based on the grounds asserted by the agency in the decision under review. *Chenery*, 318 U.S. at 93-94, 332 U.S. at 196.

The two-level "impact" test that the Court of Appeals described in its decision has never been asserted by FERC. It certainly was not applied by FERC in response to Domtar's petitions. Contrary to the Court of Appeals' ruling, it is *not* the role of a court to, in the Court of Appeals' own words, "explain" a FERC decision. (347 F.2d at 312, App. 15 (the second part of the two-part impact test "explains *Chippewa*")).

While an appellate tribunal may properly identify alternative grounds to uphold a lower *court*'s decision, and may engage in creative justifications in concluding, *e.g.*, that a challenged *law* meets a rationality test for constitutionality, as this Court explained in *Chenery*, the court's role in examining an *agency's decision* is starkly different.

When the Court of Appeals' creation of a two-level impact test is viewed in the context of the Court's waiver rulings, the pervasive nature of its deviation from core principles of appellate review becomes even more obvious.

At the same time that the Court of Appeals allowed FERC to deviate from its test in *Union Water* without acknowledgement or explanation, and created a brand-new two-level impact test that would in the Court's eyes meet requirements of predictability and coherence, the Court of Appeals also held, *inter alia*, that Domtar could

not include any citation in its briefs that had not appeared in the briefs before the agency.

For example, the Court of Appeals concluded that Domtar could not cite Section 23(a) because Domtar had not cited that specific statutory section below – even though the argument (that nothing anywhere in the FPA supports FERC's assertion of jurisdiction over a non-generating facility connected only to non-jurisdictional generation) – remained the same. Similarly, the Court of Appeals ruled that Domtar could not cite *Union Water* in support of its argument that FERC erred in not assessing the impact of the facilities individually because, while Domtar had made the argument before FERC that the agency's rulings were inconsistent because FERC sometimes considers facilities in isolation and other times aggregates their effects, the Court said (erroneously, *see supra* note 21) that Domtar had not specifically cited *Union Water* in support of its argument before the agency. (347 F.2d at 312, App. 16) Even when the Court of Appeals acknowledged that Domtar did make an argument before FERC, the Court ruled that Domtar could not re-assert the argument before the Court because Domtar had not "expanded" upon the issue before the agency. The Court so ruled even though even FERC had conceded that the argument was "closely related" to another argument (indeed, it was the *same* argument, *see* note 20), and the Court was "skeptical" that FERC had not had fair notice. (347 F.2d at 314, App. 18)

The Court of Appeals' broad reinterpretation of FERC's reasoning to meet judicial requirements of coherence and predictability, coupled with the Court's refusal to permit Domtar to deviate, even by adding citation, from the articulation of its argument before the agency, turns appellate review of administrative decision-making upside down. A party can add supporting citation upon appeal; if it could not, there would be no point in allowing new briefing at the appellate level. *See Elder v. Holloway*, 510 U.S. 510 (1994) (reversing Court of Appeals' ruling that

additional precedent could not be relied upon on appeal); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030 n.8 (9th Cir. 2000) (argument not waived by failing to raise it before agency just because the issue "may have been argued in a slightly different manner" below); *Southwestern Bell Telephone Co. v. FCC*, 100 F.3d 1004, 1007-8 (D.C. Cir. 1996) (rejecting FCC's claim that petitioner's argument was new; because "present[ing] the same basic argument in a more polished and imaginative form . . . is not the same thing as presenting a new argument on appeal"); *Ralph Shrader, Inc. v. Diamond International Corp.*, 833 F.2d 1210, 1214 (6th Cir. 1987) (rejecting argument that appellant was raising an argument not raised below, because the issue raised below was the meaning and application of UCC §2-207 and "[n]o new statutory schemes are raised on appeal;" while the district court focused on UCC §2-207(2), the court must implicitly have determined that §2-207(1) did not apply). *Cf. Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341 n.9 (D.C. Cir. 1991) (responding to defendant's claim that plaintiff was raising a "new argument" in a motion for reconsideration, noting that there was "a close resemblance" between the theory raised in the motion and plaintiff's "earlier claim").

The Ninth Circuit has stated:

> The bank argues that Puerta's argument should not be considered, because he cites some authorities, such as legislative history, which he did not cite in the district court. That argument is frivolous. An argument is typically elaborated more articulately, with more extensive authorities on appeal . . . and there is nothing wrong with that.

Puerta v. U.S., 121 F.3d 1338, 1341-42 (9th Cir. 1996).

The proper and applicable test for waiver is whether the agency had fair notice of the claim or issue. Among the claims or issues raised before FERC here were whether (1) anything in the FPA supported FERC jurisdiction over a non-generational facility connected only to non-jurisdictional generation; and (2) FERC's test for determining whether a

non-generational facility was "necessary or appropriate" to generation was consistent and coherent. Domtar gave FERC fair notice of both these claims.

To the contrary, it was Domtar that did not receive required notice, when (1) FERC abandoned the first part of the *Union Water* test requiring connection with a "licensed project" without acknowledgement or explanation; (2) FERC applied an arbitrary test for "necessary and appropriate"; (3) the Court of Appeals created a new two-level "impact" test for "necessary and appropriate" that FERC had never announced or applied, then held that FERC's ruling met the newly created test; and (4) this new test was not only newly created on appeal, but deviated from the Court of Appeals' previous explanation as to what FERC's test was in rejecting a claim of arbitrariness in *Chippewa*.

In sum, not only did the Court of Appeals' decision deviate from bedrock principles of judicial review of administrative decisions, it violated Domtar's basic due process rights as well.

CONCLUSION

The ruling of the Court of Appeals upholding FERC's decision that the FPA does not require jurisdictional generation before FERC may assert authority over a non-generating facility violates the core premise of the Federal Power Act as recognized by this Court in *Chemehuevi*. The means by which the Court of Appeals arrived at this conclusion involved multiple deviations from fundamental principles as to the proper scope of judicial review of agency decisions. It is now entirely unclear what the test is for determining whether non-generational assets are "necessary and appropriate" – the *Union Water* test? The test as announced by the Court of Appeals in *Chippewa*? Or the new test announced here? Can FERC have it both ways, asserting that a non-generating dam miles upstream from a generating dam is, on the one hand, part of the downstream generating "project" but, on the other hand, not

within the exception to licensing provided to that downstream generating project? Such a situation violates not only the FPA, but common sense and logic.

The issue whether non-generational assets fall within FERC's licensing authority is one of growing importance as the recent pronunciations on this subject in *Chippewa* and here reflect. As more assets come up for re-licensing, and as decisionmakers balance the use of hydro resources in the national energy plan, it is crucial that the fundamental scope and meaning of the FPA guide that decisionmaking. For these reasons, this Court should grant certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 11, 2003 Decided October 28, 2003

No. 97-1300

Domtar Maine Corporation, Inc.,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

Passamaquoddy Tribe,
Intervenor

Consolidated with
No. 02-1178

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Catherine R. Connors argued the cause for petitioner. With her on the briefs was *Matthew D. Manahan*.

David H. Coffman, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *Cynthia A. Marlette*, General Counsel, and *Dennis Lane*, Solicitor. *Susan J. Court*, Special Counsel, entered an appearance.

Gregory W. Sample argued the cause and filed the brief for intervenor.

Before: EDWARDS, RANDOLPH, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: The Federal Power Act of 1920, 16 U.S.C. § 791a *et seq.*, requires licensing of all dams operated on navigable waters for the purpose of generating electric power, except those authorized by a valid pre-Act permit. In this case, we must decide whether two dams are exempt from licensing because their owner operates other dams downstream pursuant to such a permit. The Federal Energy Regulatory Commission found them not exempt. Because we agree, and because we find no error in FERC's challenged orders, we deny the petitions for review.

I.

Section 4(e) of the Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission to "issue licenses . . . for the purpose of constructing, operating, and maintaining dams, . . . reservoirs, . . . or other project works necessary or convenient for the . . . development, transmission, and utilization of power across, along, from,

or in any . . . bodies of water over which Congress has jurisdiction. . . ." 16 U.S.C. § 797(e) (2000). Section 23(b)(1) makes it "unlawful . . . , for the purpose of generating electric power, to construct, operate, or maintain any dam, . . . reservoir, . . . or other works incidental thereto across, along, or in any of the navigable waters of the United States," unless FERC has issued a proper license. *Id.* § 817(1). That section, however, exempts any facility operating "under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920," the date the FPA became law. *Id.*

Petitioner, Domtar Maine Corporation, owns several hydroelectric facilities in eastern Maine. Its Forest City facility, located along the U.S.-Canadian border on the east branch of the St. Croix River, includes "a 16-foot-high, 500-foot-long dam, and a 16,070-acre reservoir." *Ga.-Pac. Corp.*, 78 F.E.R.C. ¶ 61,223, 61,953 (1997). Domtar's West Branch facility, located on the west branch of the St. Croix, comprises two developments, each of which also includes a dam and a reservoir. *Id.* Both of Domtar's facilities enhance the power-generating capabilities of two downstream projects that Domtar also operates, Woodland and Grand Falls. Forest City is thirty-five miles upstream from Grand Falls and forty-seven from Woodland; West Branch is ten miles upstream from Grand Falls and twenty-two from Woodland. *Id.* Although FERC licensed the two upstream facilities in 1980, it never licensed the downstream projects because they operate pursuant to a 1916 Act of Congress, *see* Pub. L. No. 64-234, 39 Stat. 534 (1916), and thus qualify for the exception to the FPA's licensing requirement. (Domtar actually acquired the licenses to the upstream facilities in 2001, well after the previous licensee, Georgia-Pacific Corporation, initiated

the proceedings in this case. *See Ga.-Pac. Corp., Domtar Me. Corp.,* 97 F.E.R.C. ¶ 62,078, 64,114-15 (2001). For simplicity, we will refer to the petitioner as Domtar regardless of the time period under discussion.)

In 1995, Domtar started down what would prove to be a long and complex procedural path culminating in the proceedings now before us. The company petitioned FERC to declare that the two upstream facilities, though already licensed, actually fell outside FERC's jurisdiction because the downstream projects that they benefited were themselves exempt from the licensing requirement. FERC declined to do so, holding that the downstream projects' exemption had no effect on the jurisdictional status of the upstream dams. *See Ga.-Pac. Corp.,* 77 F.E.R.C. ¶ 62,189 (1996) ("Ruling 1"), *reh'g denied,* 78 F.E.R.C. ¶ 61,223 (1997) ("Ruling 2").

Although Domtar petitioned this court to review Rulings 1 and 2, we stayed those proceedings after Domtar filed a second petition with FERC. In that petition, Domtar asked the Commission to reverse its previous decisions and hold that the upstream facilities needed no licenses. Domtar based its request on new evidence purportedly showing that the upstream facilities did not enhance the power-generation capabilities of the downstream projects. According to Domtar, this meant that neither facility was part of any "project," defined by FPA section 3(11) as a "complete unit of improvement or development, [including] all . . . dams [and] reservoirs . . . the use and occupancy of which are *necessary or appropriate* in the maintenance and operation of such unit." 16 U.S.C. § 796(11) (emphasis added). Based on Domtar's new evidence, FERC agreed that the upstream facilities did not enhance downstream

power generation and thus required no licenses. *See Ga.-Pac. Corp.*, 81 F.E.R.C. ¶ 62,222 (1997) ("Ruling 3").

The following month, several groups that had previously sought to intervene in the proceedings – including the U.S. Department of the Interior and the Passamaquoddy Tribe – petitioned FERC to rehear Ruling 3. In response, FERC asked Domtar for additional data regarding the upstream facilities, and after analyzing the data, FERC again reversed itself, concluding that the facilities in fact required licenses. *See Ga.-Pac. Corp.*, 91 F.E.R.C. ¶ 61,047 (2000) ("Ruling 4"), *reh'g denied*, 98 F.E.R.C. ¶ 61,312 (2002) ("Ruling 5"). Domtar then filed a second petition for review with this court, but simultaneously asked FERC to rehear two aspects of Ruling 5 – its refusal to offer the company any guidance on how to operate the facilities so as to avoid the licensing requirement, and its decision to solicit other applicants to replace Domtar as the licensee. Responding to Domtar's request, FERC issued a final order, again declining to provide the requested advice and standing by its decision to solicit other license applicants, but ruling that it would give Domtar an incumbent's preference in any re-licensing proceedings. *See Domtar Me. Corp.*, 99 F.E.R.C. ¶ 61,276 (2002) ("Ruling 6").

Domtar then filed a third petition for review with this court, in which it listed Ruling 6 as the ruling under review. At the time, the company's second petition for review was still pending, but we subsequently dismissed that petition as premature, explaining that when Domtar filed the petition, the company was still pressing its case before the Commission. *See Domtar Me. Corp. v. FERC*, Nos. 97-1300, 02-1126, 02-1178, 2002 U.S. App. LEXIS 18,157 (D.C. Cir. Aug. 29, 2002) (unpublished order). We

also consolidated Domtar's first and third petitions. *Id.* FERC subsequently filed a motion to dismiss the third petition, which we now address along with Domtar's first and third petitions. We also consider intervenor Passamaquoddy Tribe's argument that we should remand the case so that FERC can determine whether the upstream facilities occupy "reservations of the United States," and thus require a license under FPA section 23(b)(1).

II.

In its motion to dismiss, FERC points out that Domtar's third petition for review seeks review only of Ruling 6 – a ruling that was, according to FERC, nothing more than a denial of a rehearing request. It is true that "an order which merely denies rehearing of another order is not itself reviewable." *Microwave Communications, Inc. v. FCC,* 515 F.2d 385, 387 n.7 (D.C. Cir. 1974). It is also true that "a petition for review of an agency order must specify the order or part thereof to be reviewed," and that "[f]ailure to specify the correct order can result in dismissal of the petition." *Entravision Holdings, LLC v. FCC,* 202 F.3d 311, 312 (D.C. Cir. 2000) (internal quotation marks omitted). That said, "a party may . . . appeal from one order despite referring only to a different order in its petition . . . if the petitioner's intent can be fairly inferred from the petition or documents filed more or less contemporaneously with it." *Martin v. FERC,* 199 F.3d 1370, 1372 (D.C. Cir. 2000) (internal quotation marks omitted).

Under the circumstances of this case, we believe that Domtar's intent to seek review of Ruling 4, the underlying aggrieving order, can be "fairly inferred." We did not dismiss Domtar's second petition for review, which listed

Ruling 4, until several months after the company filed its third petition. Thus, at the time it filed that petition, Domtar already had a petition pending that sought review of Ruling 4. In light of this, Domtar's decision to list only Ruling 6 in its third petition is more reasonably viewed, both now and at the time it was filed, as evincing the company's effort to ensure that all of the Commission's orders would be reviewed, rather than as a sudden decision to reverse course and abandon any attempt to have this court review Ruling 4. To be sure, the wiser course of action would have been for Domtar to dismiss the second petition voluntarily when it filed the third, and then to list Ruling 4 in the third petition. We are nevertheless convinced that FERC could fairly infer not only that Domtar still wished to challenge Ruling 4 when it filed its third petition, but also that the company had simply made a mistake when it listed only Ruling 6 in that petition. Moreover, FERC does not claim that it suffered any prejudice because of Domtar's decision to list Ruling 6 instead of Ruling 4. It does contend that Domtar's decision reflected a strategic choice, rather than a mistake, but we think that assertion unconvincing: Domtar had nothing to gain – and much to lose – by pursuing the course it did. We will therefore deny FERC's motion to dismiss Domtar's third petition.

Turning to the merits of the petitions, we begin with Domtar's argument that Rulings 4, 5, and 6 were all beyond FERC's power to issue, and that we should therefore regard Ruling 3 – the only one in which the company prevailed – as final. Domtar points out that only parties can petition FERC for rehearing, *see* 16 U.S.C. § 825l(a), and that when the would-be intervenors asked the Commission to rehear Ruling 3, they were not yet parties to

the case. They were not yet parties because FERC did not grant their motions to intervene until Ruling 4, *see* 91 F.E.R.C. at 61,170 n.19, over two years after they petitioned for rehearing. Therefore, Domtar concludes, Ruling 3 became final when the thirty-day window to seek rehearing closed, and Rulings 4, 5, and 6 – all of which stem from the would-be intervenors' petition for a rehearing of Ruling 3 – are invalid because the Commission did not issue them in response to a proper request for rehearing.

In response, FERC insists that the requests for rehearing were procedurally proper because in Ruling 4 it granted the motions to intervene retroactive to the date of Ruling 3, a date prior to the filing of the requests. *See Ga.-Pac. Corp.*, 98 F.E.R.C. at 62,339 n.40. According to the Commission, this is not the first time that it has granted intervention retroactively. In the first case in which it did so, the Commission justified the procedure on the ground that otherwise a party would have to move to intervene prior to an initial ruling by the Commission. *See Mohawk Paper Mills, Inc.*, 33 F.E.R.C. ¶ 61,291, 61,584 (1985). This is so because a party could almost never move to intervene, have the motion granted, and then petition for rehearing all within the thirty day window established for the filing of rehearing petitions. *See id.*

Not only have we never approved FERC's practice of granting intervention retroactively, but the practice seems inconsistent with the statutory limitation that only a party can petition FERC for rehearing. Indeed, one could argue that Congress crafted that limitation for the very purpose of requiring parties to intervene before an initial Commission ruling, thus precluding them from waiting until FERC ruled and then raising new arguments that might, if brought forth initially, have saved the Commission and

the parties from spending time and money on a second proceeding. Here, however, the would-be intervenors *did* move to intervene prior to Ruling 3 – the Commission's initial ruling on Domtar's second petition; it was FERC's failure to grant intervention in Ruling 3 that later required the Commission to resort to the procedural gimmick of retroactive intervention. So even if Congress wanted to require parties to present arguments to FERC as early as possible, that objective was not subverted here. Moreover, Domtar does not claim that the retroactive grant deprived it of the ability to present any of its arguments to the Commission. Thus, while we are unprepared to say that a retroactive grant of intervention is always permissible, we conclude that in the circumstances of this case, it was. Accordingly, we reject Domtar's assertion that Rulings 4, 5, and 6 are invalid.

Domtar next claims that its two upstream facilities are covered by the 1916 law that exempts the downstream projects from the licensing requirement, and that the upstream facilities are therefore also exempt. We are unpersuaded. The 1916 statute speaks in specific terms, authorizing only the operation of "the two dams" at Woodland and Grand Falls. 39 Stat. at 534. It mentions no other facilities. Given that the upstream dams existed in 1916, we expect that Congress would have referred to them had it wanted the law to cover them. Reinforcing this conclusion, the upstream facilities are ten and thirty-five miles, respectively, from the nearest downstream project, and it seems implausible that Congress, by using the word "dams," intended to encompass not only the two downstream dams but also other facilities so far away. "If the intent of Congress is clear, that is the end of the

matter. . . ." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Domtar argues that even if the permit does not expressly cover the upstream facilities, FERC's decision to require licenses for those facilities violates FPA section 23(a), which provides in part that the Act "shall not be construed as affecting any permit . . . granted prior to June 10, 1920." 16 U.S.C. § 816. According to Domtar, if the two upstream facilities enhance the power-generating capability of the downstream projects, then requiring licenses for the upstream facilities would "affect" the projects' permit. It would do so, Domtar asserts, because the permit conferred the right to use all existing assets to generate power, and since those assets include the two upstream facilities, requiring licenses for those facilities would limit that right, thereby affecting the permit.

Because Domtar first advanced this section 23(a) argument in its reply brief, FERC has moved to strike the argument on the ground that it was raised too late. *See, e.g., A.J. McNulty & Co. v. Sec'y of Labor,* 283 F.3d 328, 338 (D.C. Cir. 2002) ("[B]ecause this point appears for the first time in the company's reply brief, we will not consider it."). Domtar responds that the argument is just a variation on those that it has made from the outset. We disagree. Domtar claims in its response to FERC's motion to strike that it has "consistently referenced 'section 23'" of the FPA. But this claim is misleading because section 23(b), which Domtar *has* referred to throughout these proceedings, and section 23(a), which it has not, are codified in two separate sections of the U.S. Code – sections 817 and 816 of Title 16, respectively. This is not, in other words, a situation in which a party cites a particular statutory section, and then later cites a subsection of that

section. Domtar now cites an entirely different section, one that we can find no citation to in the record. Even the table of authorities in the company's initial brief omits section 816, which corresponds to section 23(a), further belying Domtar's claim that it has relied on section 23(a) throughout. Moreover, while there is some nexus between the section 23(a) argument and the ones that Domtar did raise earlier, those other arguments do not, in our view, fairly raise the section 23(a) issue. Put simply, none of the other arguments required FERC to explain why its orders did not "affect" the authority that Congress conferred in the 1916 permit. Thus, FERC never had a chance to address the section 23(a) issue, either during its own proceedings or in its brief to this court. We will therefore not consider the argument now.

Next, Domtar claims that Rulings 1 and 2 constitute a departure from *Union Water Power Co.,* 68 F.E.R.C. ¶ 61,180 (1994), *reh'g denied,* 73 F.E.R.C. ¶ 61,296 (1995). According to Domtar, that case established a test for determining whether a facility falls within FERC's jurisdiction and therefore requires a license: is the facility's link to "a licensed project" strong enough to invoke FERC's jurisdiction? *Id.* at 61,888. In other words, Domtar says that *Union Water* held that the Commission would examine the "relationship between the facilities in question and the already-identified *jurisdictional* components of the hydropower project." *Id.* at 61,889 (emphasis added). Noting that its upstream facilities are linked only to two downstream projects that FERC concedes require no licenses, Domtar argues that under *Union Water,* the upstream facilities also require no licenses because they are not linked to any "licensed project."

FERC responds that in *Lake Ontario Land Development and Beach Protection Ass'n v. Federal Power Commission,* 212 F.2d 227 (D.C. Cir. 1954), we affirmed the Commission's authority to license only some parts of a project. In that case, we held that FERC's predecessor, the Federal Power Commission, could require licenses for those parts of a project that were in the United States even though it clearly could not require other parts to be licensed because they were in Canada. *Lake Ontario,* Domtar replies, was different because there the parts that were in the United States (and hence within the agency's jurisdiction) generated power. Here, by contrast, the only facilities that might fall within FERC's jurisdiction – the upstream ones – generate no power. Although FERC insists that *Lake Ontario* "did not turn on what part of a project was jurisdictional," Respondent's Br. at 20, it points to nothing either in the opinion or in later cases to support that assertion. FERC also points out that *Lake Ontario* "required that any jurisdictional facilities be licensed. . . ." *Id.* That is true, but unhelpful because Domtar argues that its upstream facilities are simply not within FERC's jurisdiction. Moreover, *Lake Ontario*'s affirmation of FERC's licensing authority does not foreclose the possibility that FERC later, i.e., in *Union Water,* interpreted the FPA to mean that a non-generating facility needs no license if it is linked only to generating facilities that are themselves exempt from the licensing requirement.

As to *Union Water,* FERC asserted in Ruling 2 that the "licensed project" and "already-identified jurisdictional components" language from *Union Water* was "simply descri[bing]" the actual projects in that case. *Ga.-Pac. Corp.,* 78 F.E.R.C. at 61,955. That assertion, however,

seems inconsistent with the actual structure of the ruling: The quoted language appears in the first two paragraphs of the ruling's discussion section; the third paragraph then begins with, "[t]urning to the facilities at hand. . . ." *Union Water,* 68 F.E.R.C. at 61,889. In other words, in the first two paragraphs FERC seems to have been speaking in general terms and laying out guiding principles of law before turning in the third paragraph to the facts of the case before it. The Commission's use of the indefinite phrase "a licensed project" instead of the more definite phrase "the licensed project" further undermines FERC's claim that it was talking about the specific facilities in the case rather than in general terms. Nevertheless, Domtar cites no case in which FERC held, as Domtar wants us to hold here, that the Commission lacked jurisdiction over a non-generating installation because the generating facilities to which the installation was connected were themselves exempt from the licensing requirement. Absent any such inconsistency between previous Commission rulings and FERC's orders in this case, we will not overturn FERC's interpretation of its own ruling. *See United Mun. Distribs. Group v. FERC,* 732 F.2d 202, 211-12 (D.C. Cir. 1984) ("[T]he Commission's decision . . . is not inconsistent with prior Commission precedent. We therefore reject [the] invitation to overturn the Commission's orders on that ground.").

Domtar next argues that FERC's orders are arbitrary and capricious because the Commission lacks a coherent test for deciding whether a facility requires a license. The company points out that FERC exercised jurisdiction over the two developments that comprise its West Branch facility even though those developments, when viewed in isolation, enhance downstream power generation by an

average of only 0.5 and 1.8 percent, respectively. Domtar then cites two cases in which FERC declined to exercise jurisdiction over facilities that enhanced downstream generation by similar percentages. *See Me. Dep't of Conservation,* 95 F.E.R.C. ¶ 62,015 (2001) (0.6 to 0.9 percent); *Matagamon Lake Ass'n,* 94 F.E.R.C. ¶ 62,195 (2001) (1.3 to 2.1 percent). Domtar's comparison misses the mark, however, because in each of the other two cases – as here – there were several upstream facilities, and the figures that Domtar cites from those cases were aggregate enhancement levels. Domtar, in other words, seeks to compare the separate enhancement levels of its facilities to the combined enhancement levels of the facilities in the two cited cases. The proper comparison is with the combined enhancement level in this case, and because that level (for West Branch and Forest City combined) ranges from 2.4 to 4.9 percent, well above the levels in the other cases, those cases provide no support for Domtar's charge of arbitrariness.

Domtar also relies on *Chippewa and Flambeau Improvement Co.,* 95 F.E.R.C. ¶ 61,017 (1998), *reh'g denied,* 95 F.E.R.C. ¶ 61,327 (1998), *aff'd,* 325 F.3d 353 (D.C. Cir. 2003). In that case, unlike here, FERC considered the impact of two upstream facilities separately even though the same entity owned both. The Commission replies that it did so because one of the two facilities enhanced downstream power generation by less than one tenth of one percent. In other words, the Commission employs two separate thresholds when determining jurisdiction: one for the collective impact of all upstream facilities owned by the same entity and a second for the impact of individual facilities. With the former, FERC declines jurisdiction over all of the facilities when their

aggregate average impact falls below a threshold that appears from FERC's cases to lie somewhere between 2 and 2.5 percent. With the latter, FERC declines jurisdiction over an individual facility and excludes its effect on downstream generation from any aggregate calculations if its impact falls below some lower threshold, i.e., 0.1 percent. This latter threshold explains *Chippewa*. Applying this two-threshold framework here, FERC considered Domtar's upstream facilities together because they were owned by the same entity and neither fell below the 0.1 percent threshold. The Commission then exercised jurisdiction because the average aggregate impact of the two facilities is 3.4 percent, far above the 2-to-2.5 percent threshold. To be sure, FERC does not explicitly advance this framework – a framework that we believe is sufficiently reasonable and predictable that we may sustain it – but we think that it "may reasonably be discerned" both from the Commission's explanation of *Chippewa* and from its decisions in other cases. *See Jost v. Surface Transp. Bd.*, 194 F.3d 79, 85 (D.C. Cir. 1999) ("We may not supply a reasoned basis for the agency's decision that the agency itself has not given. We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted).

Attempting to bolster its arbitrary-and-capricious argument, Domtar notes that in *Union Water,* FERC declined jurisdiction over a facility that impounded 4.78 percent of the usable storage in a river's storage system. According to the company, this reveals FERC's arbitrariness here because its facilities – over which FERC did exercise jurisdiction – enhanced downstream generation

by an average of 3.4 percent, and 4.78 is higher than 3.4. Domtar is comparing apples and oranges: 4.78 was not the percentage by which the facility in *Union Water* enhanced downstream power generation, but rather the percentage of the river's usable storage that the dam impounded. If Domtar wants to make a useful comparison, it can compare 4.78 to the usable-storage figure for its two upstream facilities, which FERC says is 72.26 percent. (FERC did not determine the generation-enhancing percentages in *Union Water,* so generation-enhancement figures for the two cases cannot be compared.)

Domtar also points to the Commission's decision in *Union Water* to assess the impact of several facilities individually, as in *Chippewa,* instead of aggregating their effects, as it did here. But the company failed to make this argument to FERC, and our review is limited by statute to those objections that FERC has had an opportunity to consider. *See* 16 U.S.C. § 825l(b). To be sure, the company did argue to FERC that its rulings are inconsistent because the Commission sometimes considers facilities in isolation and other times aggregates their effects. Yet it did not point to *Union Water* in making this argument, thus depriving the Commission of an opportunity to explain its own ruling. Having failed to mention *Union Water* before the Commission, Domtar may not use that case to support its argument now.

For its last argument, Domtar contends that Rulings 4 and 5 conflict with FPA section 23(b)(1), which makes it unlawful to operate a facility without a license "for the purpose of generating electric power." 16 U.S.C. § 817(1). Domtar asserts that the purpose of its upstream facilities is not power generation, but the advancement of flood control, recreational, and environmental objectives.

According to Domtar, FERC refused to consider the purpose of its facilities when determining whether they had to be licensed, thereby effectively reading the "purpose" language out of the statute.

This argument is also waived. Domtar did not make its purpose argument in its first petition to FERC, nor did it contest either the statement in Ruling 1 that the purpose of the upstream facilities was held in 1980 to be power generation, *see* 77 F.E.R.C. at 64,351, or the statement in Ruling 2 that the upstream facilities were still being operated for that purpose, *see* 78 F.E.R.C. at 61,954. True, in response to the would-be intervenors' request for rehearing of Ruling 3, the company argued that "[s]ection 23(b)(1) provides for mandatory jurisdiction only if the reservoir is operated *for the purpose of developing electric power* – and the headwater benefits analyses demonstrate that the Reservoirs in this case are not operated for that purpose. . . ." But Domtar never expanded on that assertion. In particular, it failed to mention FERC's earlier statements that the purpose of the upstream facilities was power generation – which, again, it did not object to at the time. Because a party has "at least a modicum of responsibility for flagging the relevant issues which its documentary submissions present[ ]," *AT&T Corp. v. FCC,* 317 F.3d 227, 235 (D.C. Cir. 2003), Domtar had an obligation, especially in light of its earlier silence, to state clearly that it was either disavowing any prior concessions it might have made about the facilities' purpose or contending that new evidence showed that the purpose had changed. Its failure to do so left FERC with no reason to think that Domtar was advancing an argument about section 23(b)(1).

Domtar did make a detailed purpose argument during FERC's consideration of the company's second petition, an argument that FERC responded to in Ruling 5. *See* 98 F.E.R.C. at 62,335-36. But that argument addressed how the purpose of the upstream facilities informed the question of whether they were "necessary or appropriate" to the operation of the downstream projects, and hence a part of those projects under FPA section 3(11). At oral argument, agency counsel contended that making a section 3(11) purpose argument is insufficient to raise a section 23(b)(1) purpose argument. In Ruling 4, however, FERC itself stated that the two arguments are closely related. Responding to an assertion by one of the intervenors, the Commission wrote that "[w]ere we to find that the [upstream facilities] are not necessary or appropriate with regard to the downstream projects, this would equate to a finding that the reservoirs are not being maintained for the purpose of generating electricity, so that Section 23(b) would not apply." *Ga.-Pac. Corp.*, 91 F.E.R.C. at 61,172 n.25. We are thus somewhat skeptical of the Commission's claim that because Domtar only raised a section 3(11) purpose argument, FERC had no notice of the section 23(b)(1) purpose argument. That said, we do not think that a concession by FERC that two arguments are closely related (if not equivalent) allows a litigant to make one argument to the Commission and then the other on appeal. If Domtar wished to argue that FERC was ignoring the language of section 23(b)(1), it had an obligation to make that argument to the Commission. Having failed to do so, it may not ask us to entertain the argument now. *See* 16 U.S.C. § 825l(b).

III.

This brings us finally to the Passamaquoddy Tribe's contention that we should remand the case so that FERC can decide whether Domtar's upstream facilities occupy "reservations of the United States." 16 U.S.C. §§ 797(e), 817(1). If they do, then FERC would have an additional basis for requiring that the facilities have licenses, *see id.* § 817(1), as well as several more requirements to satisfy before it could issue a license, *see id.* §§ 797(e), 803(e). But because FERC has already determined that it has jurisdiction over the facilities, nothing would be gained by finding another basis for jurisdiction. As to the additional requirements, the Commission tells us (and Domtar agrees) that it can address them during re-licensing proceedings. Since Congress has not spoken directly to this issue, and since the Commission's position represents a reasonable interpretation of the Federal Power Act, we must defer to it. *See Chevron,* 467 U.S. at 842-43. Moreover, we have long given agencies broad discretion as to the manner in which they carry out their duties, including the timing of their own proceedings. *See Natural Res. Def. Council, Inc. v. SEC,* 606 F.2d 1031, 1056 (D.C. Cir. 1979) ("[T]he agency . . . alone is cognizant of the many demands on it, its limited resources, and the most effective structuring and timing of proceedings to resolve those competing demands. An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in any proceeding. . . ."). Indeed, at oral argument, counsel for the Tribe agreed that FERC's approach would make no substantive difference, saying that while there may be efficiency considerations, ultimately this is simply "a question of now or later." Under these circumstances, we decline the

Tribe's invitation to remand the case for further proceedings.

IV.

The petitions for review are denied.

So ordered.

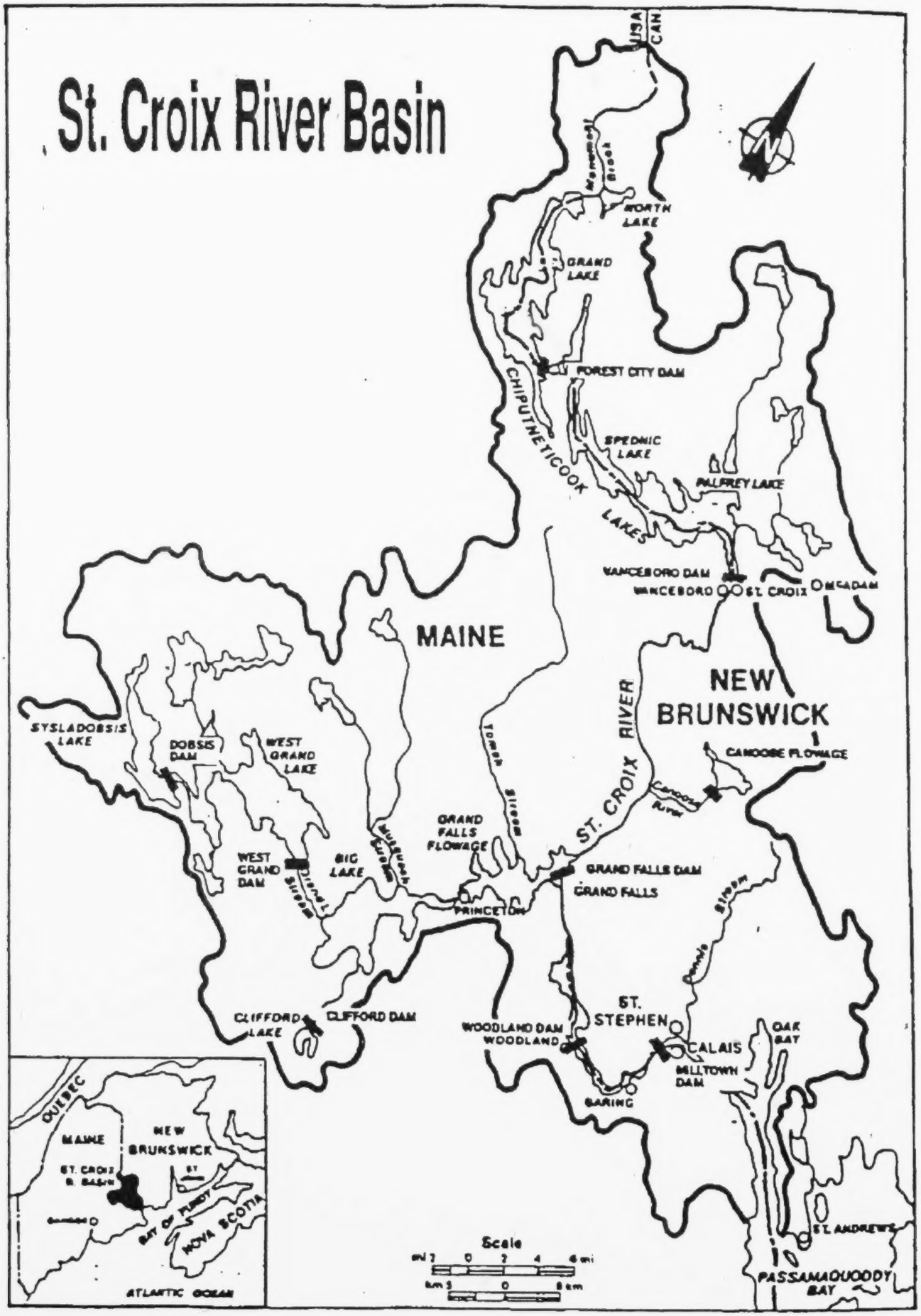

Figure 1 - St. Croix River Basin

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Supreme Court, U.S.
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No. 03-1081

In the Supreme Court of the United States

DOMTAR MAINE CORPORATION, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission reasonably concluded that Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(1), requires the licensing of two reservoirs that are necessary or appropriate in the maintenance and use of downstream hydroelectric projects that are exempt from FERC licensing.

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§ 313(b), 16 U.S.C. 825*l*(b) 8

In the Supreme Court of the United States

No. 03-1081

DOMTAR MAINE CORPORATION, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 347 F.3d 304. The orders of the Federal Energy Regulatory Commission are reported at 77 F.E.R.C. ¶ 62,189 (1996), 78 F.E.R.C. ¶ 61,223 (1997), 91 F.E.R.C. ¶ 61,047 (2000), 98 F.E.R.C. ¶ 61,312 (2002), and 99 F.E.R.C. ¶ 61,276 (2002).

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2003. The petition for a writ of certiorari was filed on January 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 4(e) of the Federal Power Act (FPA), 16 U.S.C. 797(e), authorizes the Federal Energy Regulatory Commission (FERC) "[t]o issue licenses * * * for the purpose of constructing, operating,[] and maintaining dams, * * * reservoirs, * * * or other project works necessary or convenient for * * * the development, transmission, and utilization of power across, along, from, or in" any waterway subject to regulation by Congress under the Commerce Clause. 16 U.S.C. 797(e). Section 3(12) of the FPA defines "project works" as "the physical structures of a project." 16 U.S.C. 796(12). Section 3(11) defines "project" as a "complete unit of improvement or development," including "reservoirs * * * the use and occupancy of which are necessary or appropriate in the maintenance and operation of said unit." 16 U.S.C. 796(11). Section 23(b)(1) makes it "unlawful for any person * * * for the purpose of developing electric power, to * * * operate, or maintain any * * * reservoir * * * across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of" either "a permit or * * * right-of-way granted prior to June 10, 1920," the FPA's date of enactment, or "a license granted pursuant to this chapter." 16 U.S.C. 817(1).

2. Petitioner operates two storage reservoirs that do not generate power, the Forest City Project and the West Branch Project. *Georgia Pac. Corp.*, 77 F.E.R.C. ¶ 62,189, at 64,350-64,351 (1996).[1] Forest City consists of a dam and a reservoir that are located on the east branch of the St. Croix River in Maine, and West

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[1] Unless otherwise indicated, all citations to the *FERC Reports* are captioned *Georgia Pac. Corp.*

Branch consists of two reservoirs, West Grand Lake and Sysladobsis Lake, that are located on the west branch of the St. Croix. 78 F.E.R.C. ¶ 61,223, at 61,953 (1997). Both reservoirs ultimately feed into petitioner's two downstream hydroelectric projects, Grand Falls and Woodland, which are not licensed by FERC because the projects were authorized by an Act of Congress that pre-dated the FPA. Act of Aug. 25, 1916, ch. 407, 39 Stat. 534; 78 F.E.R.C. at 61,953. When FERC originally licensed Forest City and West Branch in 1980, it found that each project was operated to enhance generation at Grand Falls and Woodland. 77 F.E.R.C. at 64,351; 12 F.E.R.C. ¶ 62,141, at 63,271 (1980) (Forest City Project No. 2660); 12 F.E.R.C. ¶ 62,157, at 63,297 (1980) (West Branch Project No. 2618).

In 1995, petitioner requested a declaratory order stating that licenses are not required for Forest City and West Branch because they do not generate power and are upstream of generating facilities that are themselves exempt from the Act's licensing requirements. FERC denied the petition. 77 F.E.R.C. at 64,352. FERC explained that "[t]hese projects substantially benefit the generation of electricity at [petitioner's] downstream Grand Falls and Woodland Hydro Projects," and that "[t]he West Branch and Forest City Projects are pursuant to the terms of section 3(11) of the Act, part of the same unit of development as the Grand Falls and Woodland Projects." *Id.* at 64,351. FERC also rejected petitioner's reliance on the fact that the generation projects enhanced by West Branch and Forest City are not subject to a license under the FPA. FERC concluded that "[t]he requirements under section 23(b)(1) of the act (absent a pre-1920 permit) for the licensing of dams and reservoirs operated to develop electric power has no

such proviso." *Id.* at 64,352. FERC denied rehearing, reiterating that "section 23(b)(1) of the FPA does not state that dams and reservoirs operated to develop electric power must be connected to jurisdictional generating facilities to warrant licensing." 78 F.E.R.C. at 61,953.

In 1997, petitioner filed a second petition for a declaratory order, arguing that the reservoirs did not require FERC licensing because they were not part of the same project or unit. In light of a headwater benefits analysis presented to FERC in support of the petition, FERC concluded that it was "unable to determine that the reservoirs provide benefits to downstream generation." 81 F.E.R.C. ¶ 62,222, at 64,483 (1997). After several parties petitioned for rehearing, petitioner provided FERC with additional data concerning flows from the reservoirs. 91 F.E.R.C. ¶ 61,047, at 61,170 (2000).

FERC granted rehearing, concluding that the reservoirs are required to be licensed. 91 F.E.R.C. ¶ 61,047. FERC explained that, "in determining whether licensing is required for a facility such as a storage reservoir that is not directly connected to other project works, the FPA requires an examination of whether the facility is necessary or appropriate in the maintenance of a complete unit of hydropower improvement or development." *Id.* at 61,171. FERC found that the evidence established that "operation of the Forest City and West Branch Projects not only provides a significant increase in generation at the downstream Grand Falls Project, but also provides additional generation at times when that generation is particularly valuable." *Id.* at 61,172. FERC therefore concluded that "these facilities are necessary or appropriate in the maintenance and operation of the unit of development that

includes the Grand Falls Project." *Ibid.* FERC denied rehearing in two separate orders. 98 F.E.R.C. ¶ 61,312 (2002); *Domtar Me. Corp.*, 99 F.E.R.C. ¶ 61,276 (2002).

3. The court of appeals found no error in FERC's orders and denied a petition for review. Pet. App. 1-20. The court of appeals found that FERC's orders were not inconsistent with a prior FERC decision, *Union Water Power Co.*, 68 F.E.R.C. ¶ 61,180 (1994), reh'g denied, 73 F.E.R.C. ¶ 61,296 (1995), and that FERC's determination that petitioner's reservoirs enhanced petitioner's exempt downstream power generation facilities was not arbitrary and capricious. Pet. App. 11-16.

ARGUMENT

1. Petitioner argues (Pet. 17-25) that this Court's review is warranted to resolve whether FERC had the authority to license its reservoirs based on FERC's conclusion that the reservoirs enhanced petitioner's generational facilities that are exempt from FERC's licensing authority under a pre-1920 Act of Congress. We are aware of no other appellate decision—and petitioner cites none—that involves that issue, much less that conflicts with the court of appeals' ruling. Indeed, petitioner expressly concedes that the court of appeals in this case "correctly noted that there is no case law on the primary issue presented to it" concerning the licensing of the facilities at issue here. Pet. 17. This Court's review of the court of appeals' decision is accordingly not warranted.

Petitioner's contention that FERC erred is also without merit. Section 23(b)(1) speaks in sweeping terms and makes it unlawful to operate any reservoir "for the purpose of developing electric power" without appropriate authorization. 16 U.S.C. 817(1). Similarly,

FERC has the authority to issue licenses for "reservoirs * * * or other project works necessary or convenient for * * * the development, transmission, and utilization of power," 16 U.S.C. 797(e), and the Act broadly defines "project works" as "the physical structures," 16 U.S.C. 796(12), of any "complete unit of improvement or development," including, "reservoirs * * * the use and occupancy of which are necessary or appropriate in the maintenance and operation of said unit." 16 U.S.C. 796(11). As FERC concluded, "[n]othing in Section 23(b)(1) requires that storage facilities be connected to licensed generating facilities in order to be subject to licensing." 91 F.E.R.C. at 61,170. Indeed, FERC explained that acceptance of petitioner's counter-textual reading would create a huge loophole in which

> the holder of a valid pre-1920 permit that solely authorized construction of a generating project located on a navigable water could, in order to provide flows to the project, build a new reservoir miles upstream that impeded the flow of the navigable water or could construct bypass facilities that dewatered a stretch of the river, without the need to obtain any authorization from the Commission.

78 F.E.R.C. at 61,955. FERC reasonably interpreted the FPA to prevent that kind of circumvention of the Act.

Here, FERC concluded that petitioner's reservoirs, which themselves are not subject to a pre-1920 permit, Pet. App. 9, are necessary and appropriate in the maintenance of petitioner's downstream generation facilities. 91 F.E.R.C. at 61,171-61,172; see also 78 F.E.R.C. at 61,954 ("Section 23(b)(1) states that dams and reservoirs located on navigable waters and operated for the

purpose of generating electricity must * * * be licensed. The Forest City and West Branch Projects fit within this definition."). That fact-bound conclusion warrants no further review by this Court.[2]

2. Petitioner also argues (Pet. 18-19, 26) that FERC inadequately failed to explain a departure from its prior precedent in *Union Water Power Co.*, 68 F.E.R.C. ¶ 61,180. *Union Water*, however, did not involve a generational facility that was operating under a pre-1920 Act of Congress, and FERC accordingly had no occasion in that case to interpret the FPA in a context involving such a facility. As the court of appeals concluded, petitioner "cites no case in which FERC held * * * that the Commission lacked jurisdiction over a non-generating installation because the generation facilities to which the installation was connected were themselves exempt from the licensing requirement." Pet. App. 13.

3. Petitioner also argues (Pet. 25-29) that the court of appeals violated principles of administrative law by creating a *post-hoc* "two-level 'impact' test" rationale to justify one of FERC's rulings, and by holding that petitioner waived various arguments below. Those case-specific contentions lack merit.

As to the first contention, the court did not create a new rationale for FERC's orders, but simply compared the orders at issue with FERC's prior orders to discern the path of FERC's reasoning for its conclusion that

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[2] Petitioner errs in relying (Pet. 21-22 & n.18) on this Court's observations in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409, 413 (1975), that FERC's licensing jurisdiction is limited to projects designed to produce water power. As discussed, FERC specifically found that petitioner's reservoirs enhanced the power of petitioner's downstream generational facilities.

petitioner's reservoirs enhanced the downstream generation facilities. Pet. App. 13-16. Thus, the court of appeals rejected petitioner's contention that FERC's focus on the collective impact of petitioner's reservoirs conflicted with FERC's consideration of the individual impacts of two reservoirs in *Chinook Pipeline Co.*, 94 F.E.R.C. ¶ 61,017 (2001); *Chippewa & Flambeau Improvement Co.*, 95 F.E.R.C. ¶ 61,327 (2001), review denied, 325 F.3d 353 (D.C. Cir. 2003). The court of appeals properly accepted FERC's explanation that the Commission did not aggregate the impact of one of the two reservoirs in that case because it enhanced downstream generation by less than 0.1%, and reasonably concluded that FERC would neither exercise jurisdiction over nor aggregate the impacts of individual reservoirs falling below a 0.1% threshold. Pet. App. 14-15. The court also concluded that where the aggregate impact of the reservoirs that individually exceed that 0.1% threshold falls below a threshold between 2% and 2.5%, FERC will also decline jurisdiction. *Ibid.* The court of appeals determined that the basis of FERC's decision may reasonably be discerned from FERCs order and its decisions in other cases. *Id.* at 15. That conclusion warrants no further review.

Finally, there is no basis for this Court's review of petitioner's contention that the court of appeals erred in refusing to consider various arguments that petitioner did not raise before FERC. Section 313(b) of the FPA precludes consideration of any objection on judicial review that was not raised before FERC on rehearing, absent good cause. 16 U.S.C. 825*l*(b). The court of appeals here carefully reviewed the record and correctly found that petitioner did not give FERC adequate notice of various arguments allegedly supporting petitioner's challenge to FERC's orders. Pet. App.

10-11, 16, 17-18. Those fact-bound conclusions do not warrant this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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